

Inclusion, Equity & Diversity 2.0

A Panoramic View and Update of IE&D's Hot Issues

Littler

ACC Association of
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— NATIONAL CAPITAL REGION —

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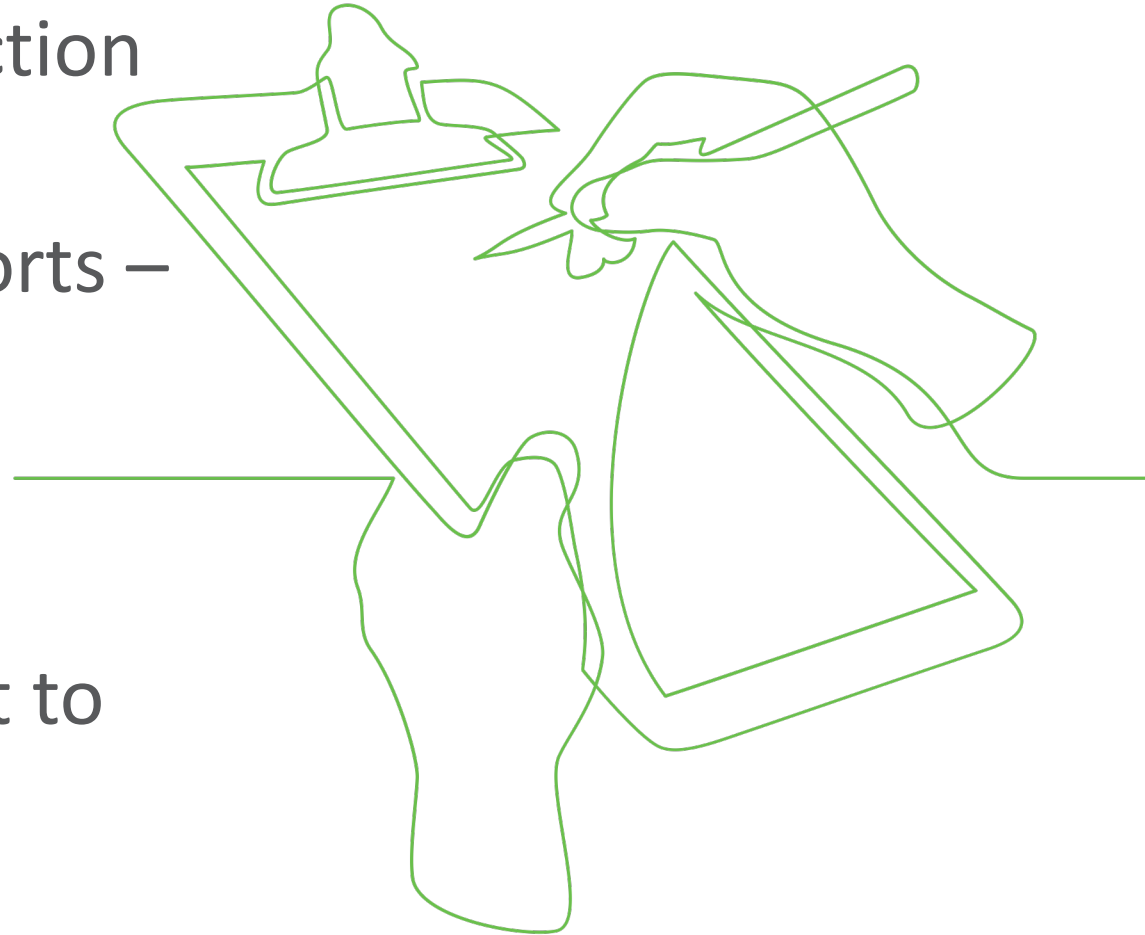
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Agenda

- Diversity Goal Setting, Affirmative Action and Litigation Challenges
- Legislative Challenge to Diversity Efforts – Florida’s “Stop W.O.K.E. Act”
- How Does ESG Reporting Fit Into a Company’s Diversity Efforts
- Artificial Intelligence – Is it Intelligent to Use AI?





Diversity Goal Setting and Affirmative Action

History of Affirmative Action



Affirmative Action Permitted in Limited Context by Government Contractors



President Johnson issued Executive Order 11246 in 1965 requiring all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities. At the time, the Federal Government also established the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor to administer the Order.



Based on the Executive Order, which has continued in effect to date, federal contractors and subcontractors with 50 or more employees who have entered into a contract of \$50,000 or more with the federal government are required to prepare and maintain a written affirmative action plan for each “establishment,” which includes setting up goals and timetables for each job group in which minorities and females are underutilized in the applicable recruiting area.

Affirmative Action Requirements for Federal Contractors

(e) Submission of Documents; Standard Affirmative Action Formats. Each prime contractor or subcontractor with 50 or more employees and a contract of \$50,000 or more is required to develop a written affirmative action program for each of its establishments.

ESTABLISHMENT OF GOALS AND TIMETABLES FOR GOVERNMENT CONTRACTORS

OFCCP's Executive Order 11246 affirmative action program (AAP) regulations require contractors to establish a placement goal for a particular job group when it is underutilized – that is, when the percentage of women and/or minorities is less than would be reasonably expected given the representation of women and/or minorities available for employment in that job group.

See [Disaggregating Minority Groups for AAP Placement Goals | U.S. Department of Labor \(dol.gov\)](#)

Affirmative Action & Diversity Programs: The Differences

Affirmative Action

- Required – driven by government regulations
- Groupings are by affirmative action job groups
- Based on government methodologies, placement goals are set where appropriate utilizing current census data
- How to measure success – good faith efforts and success in meeting placement goals

Diversity, Equity & Inclusion

- A choice – driven by each company
- Groupings are driven by company initiatives
 - Executives, Managers, Professionals – others??
- How to measure – formal or informal goals
 - Do the analytics show there is an issue?
- Identify areas where a company has underrepresentation based on race, ethnicity, and gender, and set goals based on availability
- Include an annual pay equity self-audit seeking to eliminate pay disparities
- Develop and include best practices in enhancing outreach and recruitment to expand applicant flow
- Typically include support for ERGs and affinity groups as the company seeks to build internal stakeholders and allies committed to DEI
- Typically include training programs, workshops, and speaker series
 - Training programs often include unconscious bias training and allyship training

Potential Issues

How goals & initiatives are set

- What is management held accountable for – AAP or DE&I goals, or both?
- How are they held accountable?
- Is management rewarded for success on both or just one set of initiatives?
- How are goals & initiatives communicated?

Accountability

- What is management held accountable for – AAP or DE&I goals, or both?
- How are they held accountable?
- Is management rewarded for success on both or just one set of initiatives?

Aligning, Not Undermining

Align

- Consider utilizing your affirmative action plans as a building block for developing your DE&I initiatives or metrics
- Communication – aligning so that AAP & DE&I initiatives complement each other
- Showing management the value in both programs and how they can complement each other

Undermine

- Setting DE&I initiatives that conflict with your AAP goals
- Communication – avoid terminology that disparages one set of initiatives or the other (e.g., “AAP are quotas” or “Diversity metrics are our focus”)
- Avoid rewarding management for “success” on DE&I initiatives only (monetarily and in recognition)
- Recruiting & promoting only those who fall in the groups your DE&I initiatives are focused on



Reverse Race Discrimination and Litigation Challenges to DE&I

“Reverse” Discrimination

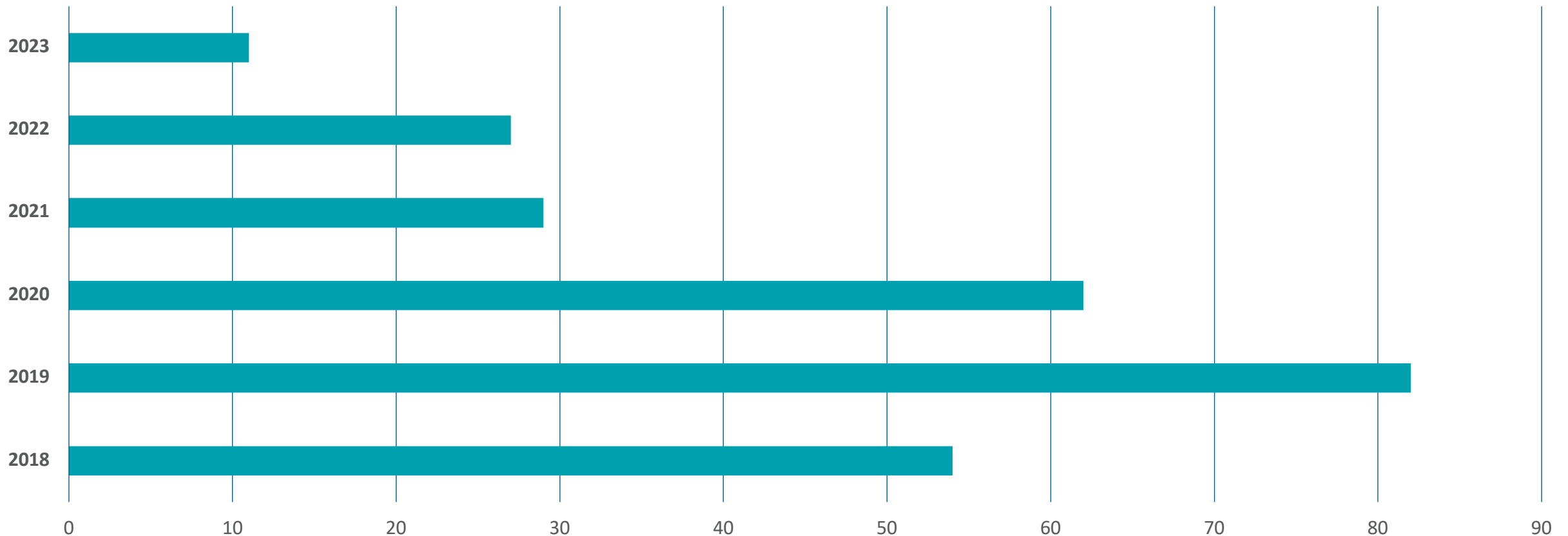
What is a Reverse Discrimination Claim?

- Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on their race, color, religion, sex, or national origin
- It is well-settled that Title VII protects all individuals; for example, white or male employees enjoy essentially the same protections as African American/Black or female employees



Recent Trends in Reverse Discrimination Litigation

Federal Reverse Discrimination Cases Filed By Year



Examples of Concerning Trend of Employee Litigation Challenging DEI Efforts

- State Court **lawsuit challenging an employer's DEI initiatives/policies**, as of January 2022, which included **increasing BIPOC representation to at least 30% at all corporate levels and at least 40% of all retail and manufacturing roles by 2025**
- Federal Court **lawsuit** by Plaintiff, a **white male**, **alleging that his termination** in connection with a reduction in force **was motivated by employer's "Diversity & Inclusion Plan."** Court denied motion to dismiss and considered that the **DEI Plan's stated goal was allegedly "to increase and foster workplace diversity throughout the Company,"** and senior leaders were provided "detailed workforce demographic information" so that they could implement the Plan via "hiring and retention policies that altered the racial, ethnic, and gender composition of the company's workforce."
- Federal Court action **challenged employer's nine-year commitment to boost representation of historically underrepresented groups based on a "fellows" program** alleging that it was "discriminatory on its face" because white and Asian-American applicants were not permitted to apply; only Black, Latino and Native American candidates could participate

What do the Trends in Reverse Discrimination Filings Tell Us?



It has long been the case that occasional single-plaintiff cases alleging discriminatory treatment of a “majority” employee based on a protected characteristic were filed

- The number of single-plaintiff reverse discrimination claims peaked in 2018 and 2019 (in the last two years of the Trump presidency) and have subsided since 2020 (since the start of the Biden presidency)
- These numbers might suggest that we are seeing a cooling of the influence of politics on such claims



What is increasing are putative *class action* cases that seek class-wide relief (typically on behalf of white or male employees or applicants) claiming that minority employees or applicants were treated more favorably



Nearly non-existent before, 6 new class action cases filed since 2018

What is Driving Class Action Reverse Discrimination Claims?

Challenges to DEI initiatives and policies (or *perceived* DEI initiatives)

- There has been an uptick in companies receiving employee complaints and concerns associated with DEI initiatives on the grounds that they disadvantage members of historical majority groups
- Many of these complaints and concerns stem from training and mentorship programs, as well as internship and hiring initiatives, where participation can sometimes be predicated on protected characteristics

Many DEI-related claims are being driven by law firms that now appear to specialize in such cases (the so-called “anti-woke” law firms)

Law Firms Promoting Reverse Discrimination Claims

Woke Corporations

America First Legal is holding corporate America accountable for illegally engaging in discriminatory employment practices that penalize Americans based on race and sex.

Facing a New Threat



The America First Legal Center for Legal Equality is an initiative—housed within our 501(c)(3) nonprofit legal foundation—to facilitate legal representation to victims of both private and public sector discrimination on the basis of race, sex, religion, or political belief. The AFL Center for Legal Equality is being established in response to the new “equity” crusade that has overtaken Big Business, Big Education, and Big Government.

Law Firms Promoting Reverse Discrimination Claims



HOME PRACTICE AREAS FIRM OVERVIEW

Our reverse discrimination attorneys fight passionately to protect your rights.

We have anti-discrimination laws—and affirmative action policies—because of the long history of racism and sexism in this country. The assumption is that we need these laws and policies to protect historically disadvantaged groups (like minorities and women) from mistreatment and to ensure historically privileged groups (like white men) do not continue to enjoy an unfair advantage.

However, many people would argue that affirmative action and quota systems are not helping to end discrimination. Instead, they are creating and perpetuating a new kind of discrimination—reverse discrimination.



HOME

PRACTICE AREAS

SEVERANCE

HARASSMENT

DISCRIMINATION

New York Reverse Discrimination Lawyers | New York Employment Attorneys

Reverse discrimination is a legitimate issue. Perhaps you're a man who has been denied family leave to nurture a newborn, even though female employees have been granted this leave for the same purpose. Maybe you didn't receive a job because you're a U.S. citizen and the potential employer prefers non-citizens. If you have experienced this kind of treatment in New York, the NYC Reverse Discrimination lawyers of Castronovo & McKinney are qualified to assess your claim and assist you in pursuing it.



Employment Law Attorneys Fighting Against Reverse Discrimination in the Workplace

Reverse discrimination in the workplace is another term for employment discrimination. However, instead of targeting minority groups (Americans, Asians, Women, or Muslims, to name a few), the targeted group is filled with people considered to be in the majority (white men).

These targeted individuals may lose job opportunities or even get fired from work due to companies implementing diversity programs.

Media Coverage of Claims Attacking DEI Initiatives

“It’s so common that you barely notice it, but the biggest companies in the country discriminate openly against their employees on the basis of skin color. They call it ‘equity’ – it’s racism. But it’s everywhere, it’s illegal. What’s changing is that some employees are now fighting back.”

- Tucker Carlson, Tucker Carlson Tonight, 8/31/2022

Media Coverage of Claims Attacking DEI Initiatives



THE
PIVTORAK
LAW FIRM

“The reason this is happening is because back in the summer of St. Floyd in 2020, a lot of these corporations saw that the BLM rioters were allowed to burn down entire cities with absolutely zero consequences because it was in the name of social justice. So why wouldn’t the companies be emboldened to treat their white employees like second class citizens and violate their most fundamental civil rights laws in this country?”

Sample Class Action Reverse Discrimination Allegations

- Race, not merit and past performance, was the dominant factor for hiring and promotion decisions.
- “Racial engineering” policies led to reverse discrimination because of a company’s anti-racism initiative.
- DEI policies gave preferential treatment to racial minorities and signaled that the white race would impede their progress at the company.
- DEI policies used to increase number of minority employees and reduce percentage of white employees.
- Scholarship program, focused on creating opportunities for minority students, deprived white students of opportunities because they are white and are in place to “racially balance” its workforce.
- DEI council “dedicated to collaborating on impactful decisions and championing DEI at the highest levels of the organization” was engaging in gender discrimination by driving an increase in the number of women on the senior leadership team.

Alleged Nationwide Reverse Discrimination Class

Sample Nationwide Class Definition

All past, present, or potential white employees of X who, as a result of the operation of past, current, or planned policies and practices, have been, are being, or will be discriminated against in the terms and conditions of employment, including but not limited to recruitment, hiring, promotions, training, and discharge because of their race.

Reliance on DEI Initiatives to Support Motion for Class Certification

Previously, aside from an employer's anti-discrimination policy, there was little for a class representative in a reverse discrimination class action to rely on to obtain Rule 23 class certification



Plaintiffs are now pointing to company-wide DEI initiatives, goals, and policies as the alleged “common practices” driving their commonality and typicality arguments on class cert motions

Alleged Common Questions Supporting Rule 23 Class Certification

1

Whether the defendant's DEI initiatives, policies, and practices amount to discrimination or preferential treatment on the basis of race

2

Whether a defendant instituted DEI initiatives, policies, and customs that created a racially intimidating work environment

3

Whether defendant created racial quotas for leadership positions as a result of DEI initiatives, policies, and practices

Discovery Dangers in Class Action Reverse Discrimination Cases

Plaintiffs' reliance on DEI initiatives creates the potential for considerable discovery concerns

Concern that some of the underlying data analyses provide ready-made statistical evidence in such cases

Discovery seeking communications and other documents regarding the creation of DEI initiatives and policies

Discovery seeking communications and other documents regarding the setting of DEI initiatives, goals, and analytics

Discovery seeking data and analyses driving DEI initiatives and efforts



The Supreme Court's Harvard/UNC Decision

The Laws in Play

- **Equal Protection Clause**
 - “No State shall...deny to any person within its jurisdiction the equal protection of the laws.”
- **Title VI of the Civil Rights Act of 1964**
 - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”



It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964



All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens[.]

42 U.S.C. § 1981

Harvard/UNC Decision

- On June 29, 2023, the U.S. Supreme Court found that Harvard's and UNC's race-conscious student admissions practices violate the Equal Protection Clause.
- Given the Court's view that "racial discrimination is invidious in all contexts," the Court's majority opinion held that university programs, consistent with precedent, must:
 - a. Adhere to strict scrutiny
 - b. Refrain from using race as a stereotype or negative
 - c. Have a logical end point
- Harvard and UNC's stated reasons for using race-conscious admissions could not be subjected to meaningful judicial review.
 - Harvard's reasons: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks."
 - UNC's reasons: "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Harvard/UNC Decision

- The Court also held that the programs “fail to articulate a meaningful connection between the means they employ and the goals they pursue.”
- The use of six racial categories to classify applicants were deemed too “imprecise” and overbroad to achieve the kind of diversity sought by the universities.
- “The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”
 - According to the Court, use of race has led to assumptions that different applicants of the same race are alike.
 - The Court also chided the universities’ racial enrollment percentage data, calling it “outright racial balancing.”
- Interestingly, the Court noted that “nothing prohibits universities from considering an applicant’s discussion of how race affected the applicant’s life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.” To this end, colleges and universities may consider ways in which to incorporate such prompts in the admissions process without running afoul of the law.

The Fallout

Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs

“[T]he decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”

The Fallout – Section 1981 is the Sword

1. Class Action Filed on 8/18/23

A. Court: E.D. Va.

B. Claims: 42 U.S.C. § 1981

C. Allegations:

- 1) The company had a company-wide DE&I policy “designed to achieve inclusion quotas.
- 2) Commitment that hire and promote a certain percentage of individuals based on race.
- 3) An inclusion report issued by the company stated that leaders received incentives for having their workforces be comprised of racial and ethnic backgrounds to parity the racial demographics of the communities they serve regardless of the demographics of the applicant pool.

The Fallout – Targeting Law Firms

- On August 22, 2023, American Alliance for Equal Rights filed two separate complaints against two large law firms.
 - Claims: 42 U.S.C. § 1981
 - Allegations:
 - Both lawsuits targeted the firms' law school fellowship programs.
 - The first firm allegedly has a 1L fellowship program in which only certain races or members of the LGBTQ+ community are qualified.
 - The second firm allegedly has 1L and 2L diversity fellowships in which students of color, students who identify as LGBTQ+, or students with disabilities are qualified.
 - The lawsuits specifically cite to Harvard/UNC.

The Fallout – The Evolution of Title VII

- Federal courts across the country uniformly hold that Title VII applies to hiring, promotion, and termination decisions. But recently, the EEOC and DOJ have advocated a broader, textualist reading of what constitutes "adverse action" in the workplace under Title VII — and some federal appellate courts have begun to agree. This issue will be before the Supreme Court next term in *Muldrow v. St. Louis* and *Davis v. Legal Services Alabama, Inc.*
- On August 18, 2023, the Fifth Circuit issued its decision in *Hamilton v. Dallas County*. Similar to *Muldrow* and *Davis*, the Fifth Circuit found that Title VII prohibits discrimination in ultimate employment decisions, like hiring, refusing to hire, and discharging, it also prohibits an employer from "otherwise discriminat[ing]" against an employee in "compensation, terms, conditions, or privileges of employment."
- Notably, the concurring opinion by Judge James Ho stated:
 - *Today's decision is just the latest in a series of recent rulings designed to restore the full meaning of the Civil Rights Act for the benefit of all Americans. Groff restores Title VII for people of faith. Students for Fair Admissions restores Title VI for Asian American students. **And our decision today will help restore federal civil rights protections for anyone harmed by divisive workplace policies that allocate professional opportunities to employees based on their sex or skin color, under the guise of furthering diversity, equity, and inclusion.***

Harvard/UNC Decisions – The Takeaways



Poorly structured voluntary diversity programs pose both legal and practical risks for companies.



The Court never has blessed employers taking race-conscious employment actions based on interests in workforce diversity.



Even prior to the *Harvard/UNC* decision, it has been the case that employers generally are not permitted to take *employment actions* motivated by protected characteristics.

Harvard/UNC Decision – Guardrails for DE&I Initiatives

1. Employers should make employment decisions – including, but not limited to hiring and promotion – based on business-related criteria and not based on protected characteristics.
2. Employers should not interview or hire individuals from historically marginalized communities simply to meet a quota or quantitative goal.
3. Decision makers such as hiring managers, interviewers, talent acquisition team members, Human Resource professionals, and DE&I professionals should be trained on federal and state equal employment and anti-discrimination laws so they understand the legal framework governing their employment decisions.
4. Employers may consider incorporating unconscious bias training to further prevent unlawful (albeit inadvertent) employment decisions based on protected characteristics. However, employers should consult with counsel to ensure that any such training is constructed so that it does not run afoul of “anti-woke” laws in certain jurisdictions.
5. Remember that in successful DE&I programs, one size does not fit all.



Legislative Challenge to Diversity Efforts – Florida’s “Stop W.O.K.E. Act”

Florida's Individual Freedom Act – a.k.a. “Stop W.O.K.E. Act”

- Individual Freedom Act (IFA), also known as the “Stop W.O.K.E. Act,” acronym standing for “Wrong to Our Kids and Employees”
 - Effective July 1, 2022
 - Applies to employers with Florida operations having 15 or more employees
- The IFA’s language is broad. It applies to employer speech at any “required activity” in the workplace, not just training.
- It prohibits overt or implicit “endorsement” or “promotion” of topics the IFA prohibits (i.e., inherent bias, systemic racism, oppression, etc.)

Court Review of Florida's IFA

Chief Judge Mark Walker of the U.S. District Court for the Northern District of Florida issued a preliminary injunction, partially blocking enforcement of the IFA against employers by the Florida Commission on Human Relations and the Florida attorney general.

Court held that “the challenged provision of the Act is a naked viewpoint-based regulation on speech that does not pass strict scrutiny.”

While the attorney general’s power to prosecute employers for IFA violations has been enjoined, there is still a private right of action.

11th Circuit Court of Appeals heard oral argument on August 24, 2023.

Florida argued that the law is not a restriction of speech based on viewpoint and suggested that employers can continue to say what they wish, but they cannot mandate employees to attend.

Training Options and Florida's IFA



Employers should review organizational policies and documents (such as ethics policies, DEI statements, leadership development policies, and talent acquisition and recruitment policies) to assure compliance with the IFA's requirements.



Employers also need to be aware that the IFA applies to verbal statements made by managers, supervisors, and other corporate leaders, not just written statements.



A question arises whether an employer may use a properly worded disclaimer in training materials, policies, and other corporate documents so as not to run afoul of the IFA's prohibitions.



Employers may consider revising their DEI training materials to remove language that may be prohibited by the IFA, but this approach still adds risk given the breadth of the IFA's language, as the challenge is the lack of precision in the IFA's language.

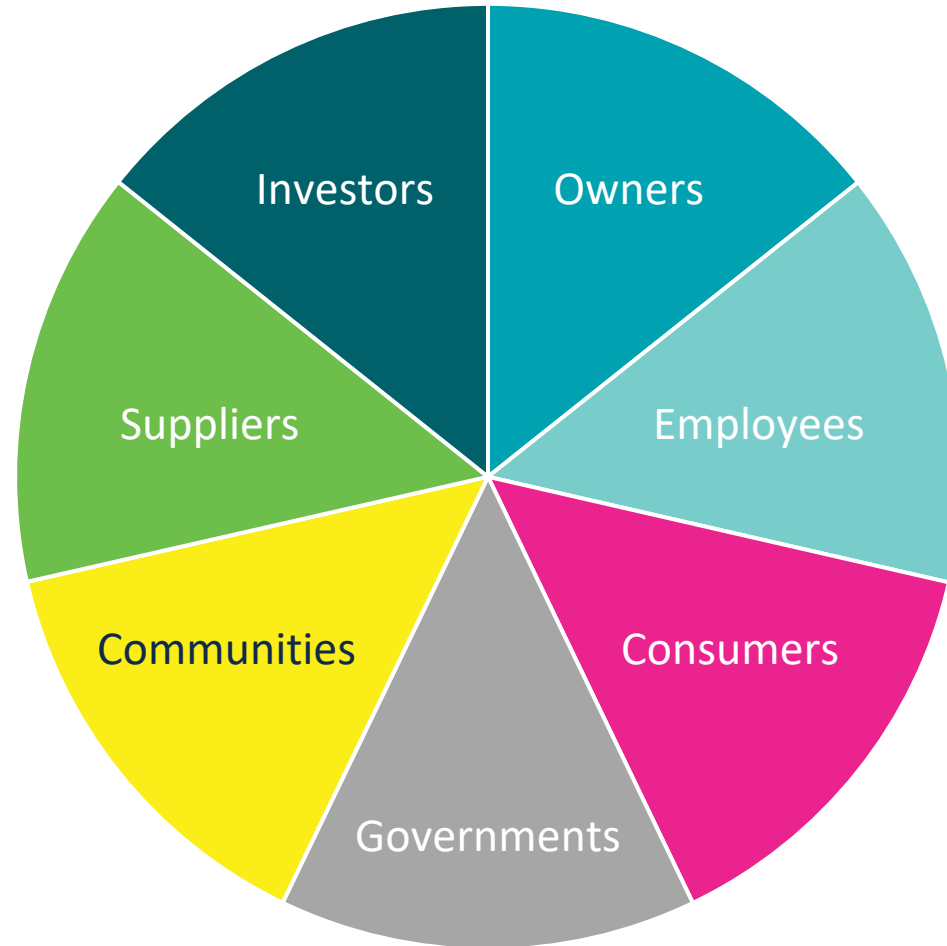


The approach providing the least risk to employers is to suspend DEI trainings (and potentially some EEO trainings, depending on their content) in Florida until the law is clarified. While not ideal, and not what most employers wish to do, it is the option that allows employers to comply with the IFA's obligations until those obligations are clarified by the courts.

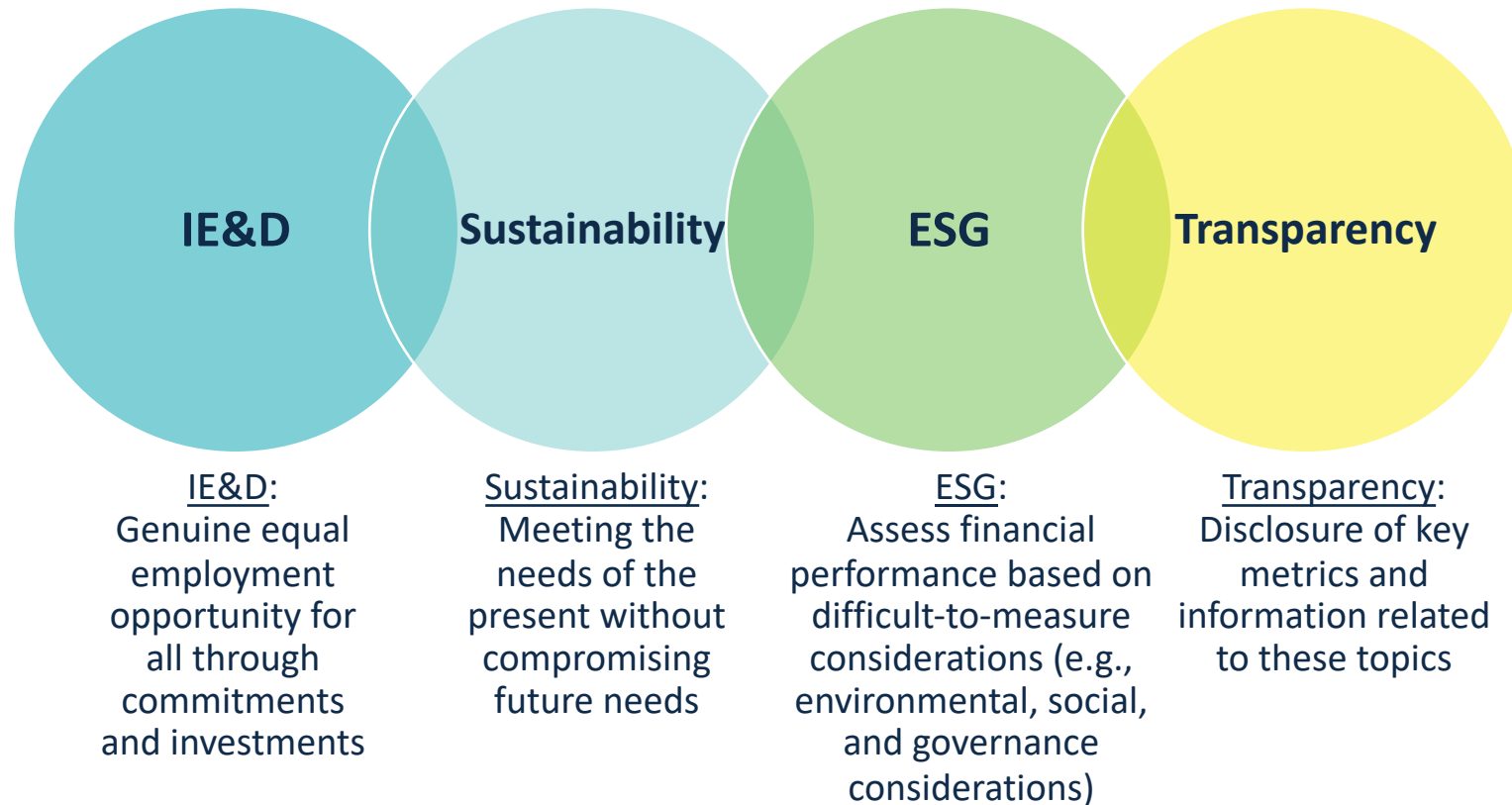


How Does ESG Reporting Fit into a Company's Diversity Efforts?

What is the Driving Significance of Key Stakeholders?



How Are Key Concepts Related?



ESG Reports: Transparency Related to DE&I

- Workforce demographics
- Pay transparency
- Whistleblowing, ethics, anti-corruption
- Employee engagement/turnover
- Worker activism
- Health and safety
- Human resources policies
- Non-discrimination
- Remote work
- Mental health and well-being
- Collective bargaining
- Data privacy



What to Include in ESG Reports?

- Consider whether specific disclosures are required; they often are not
- Develop a strategy based on relevant considerations:
 - What the organization is already doing (well)
 - Direction and oversight from management/Board of Directors
 - Standards/disclosures
 - Comparators/rating agencies and initiatives
 - Risk profile

Elements of an Effective Sustainability Strategy



All rooted in genuine accomplishments and commitments

How Will Recent Developments Impact ESG Efforts?

- DE&I initiatives may be impacted by recent legal & legislative developments (i.e., *Harvard/UNC* decision, uptick in reverse discrimination claims, anti-W.O.K.E. legislation).
- Critics of ESG investing practices could follow the trend and pursue legal action against companies, claiming breach of fiduciary duty. As an example, think back to the criticism Silicon Valley Bank received earlier this year following its collapse. Some were quick to attribute the bank's collapse to distraction caused by ESG and “woke” efforts.
- Consider messaging to your investors, clients, and consumers.

ESG Reporting – European Perspective

Increasing Legal Obligations, e.g.

- UK listed companies: from 2022
- Netherlands listed companies: first reports by October 2023
- EU: Corporate Sustainability Reporting Directive (more in-scope companies vs Non-Financial Reporting Directive) – new reporting from 2025

Beyond Legal Requirements

- Ethnicity/Class diversity
- Investor and employee demand
- Accountability: Tying DEI goals to executive comp

Regional Differences

- Hispanic? Latino?
- Impact outside your jurisdiction

ESG Reporting – APAC Perspective

US-style “protected categories” not exportable to some APAC jurisdictions:

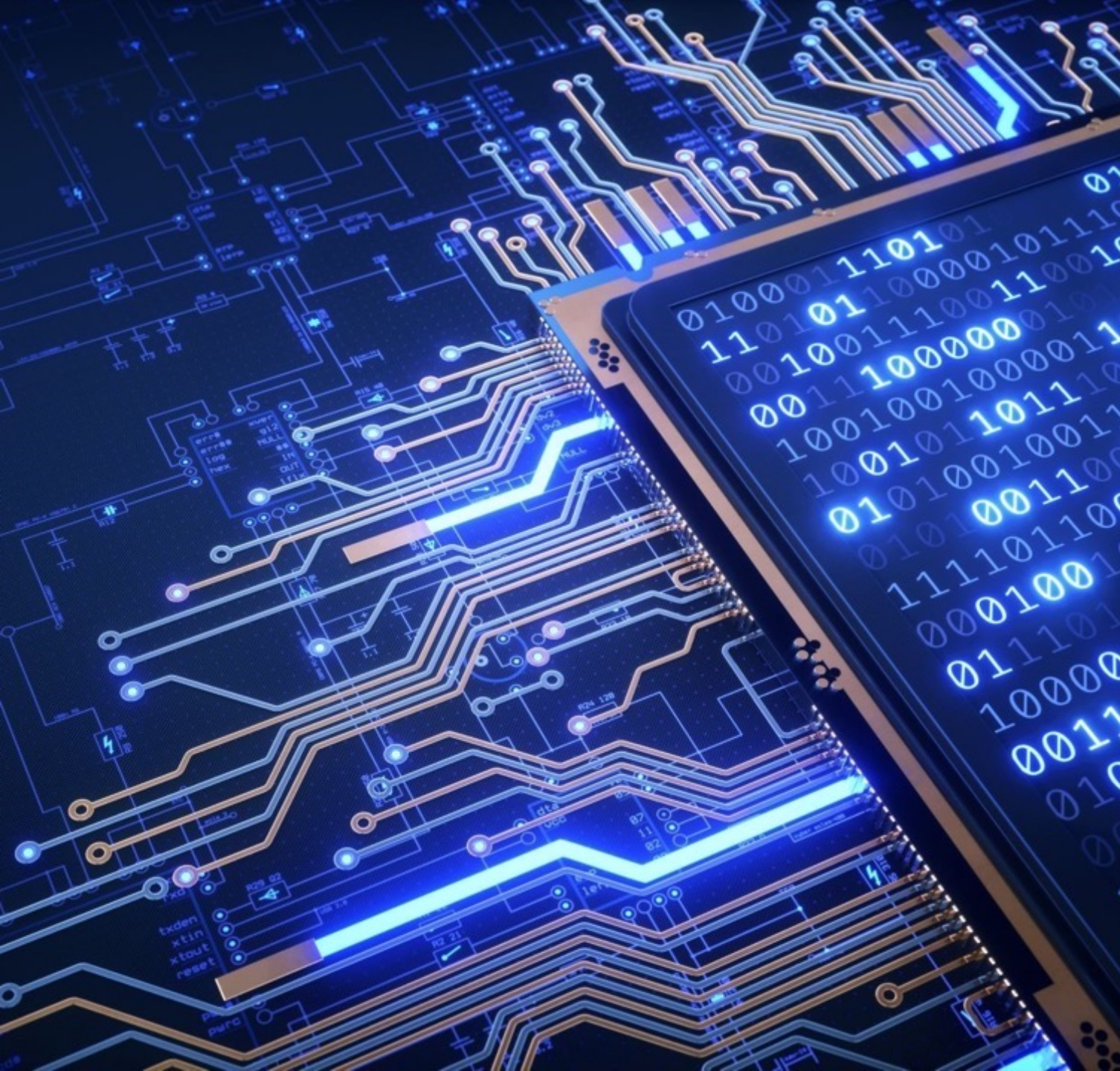
- “Veteran status” in Singapore
- “Gender-identity based preferred pronouns” in Japan

Categories of historical under-representation unique to APAC:

- “Caste” in India

Discussion of some US-style “protected categories” maybe offensive in some APAC jurisdictions:

- Gender identity and sexual orientation
- Korean ancestry/descent in Japan



Artificial Intelligence – Is it Intelligent to Rely on AI in a Company's Diversity Efforts

AI in HR: Primary Use Cases

Algorithms to **identify best-fit candidates** based on publicly available information

Algorithms to **screen/assess** candidates during the recruitment process

AI as part of **onboarding**

Augmented/virtual reality for **learning/training**

Chatbots for information look-up, employee self-service, or candidate management during the recruitment process

Wearable technology to **track employee habits**

AI as part of the **performance management** process

AI **replacing line manager** duties in allocating tasks and managing performance

AI to recommend **benefits** elections

AI to customize **compensation** or improve pay benchmarking

AI to **recommend job openings**, career paths, or learning to current employees

AI to identify **employees who are disengaged** and/or at risk of leaving

AI to **“nudge” managers** to take action or have conversations with employees

AI as part of the **succession planning** process

Source: *Mercer Global Talent Trends 2020-2021*

Recruitment & Selection: Know the Tool

01

Be able to explain how the tool operates, including what data is used and how

02

Ensure that any AI-driven tool can successfully pass a bias audit by an independent auditor

03

Pay attention to the types of questions asked and information elicited by chatbots to limit the inadvertent receipt of information that cannot be relied upon to make employment decisions

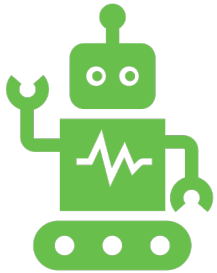
04

Ensure the tool flags certain issues, rather than disregards a candidate entirely based on a single issue, such as a gap in employment (which could be due to childcare or a medical need)

05

Confirm the tool makes clear that reasonable accommodations are available for persons with disabilities, including an accessible interface

Performance Management



Decide which specific types of performance management decisions should be informed by AI-driven tools. They may not all be best served by automation.



Identify and train the performance management leaders that will use the AI-driven tools. Enable the team to feel confident about interpreting algorithmic recommendations.



Be transparent about the purpose of any tracking technology. Consider making it for informational rather than for evaluation by giving employees the opportunity to self-monitor.

For AI Tools Used Across the Life-Cycle

- Employers should ask the big questions now...and have a vision of what the right answers are
 - What is a disparate impact that matters?
 - Can a defense be based on correlation and not causation?
 - Is it enough if a tool reduces, but does not eliminate, potential adverse impact?
 - Can the right information be gathered without violating privacy laws?
 - How will access and disability accommodation issues affect what employers do?

Know the Current Legal Landscape

Federal

- National AI Initiative Act
- The Algorithmic Accountability Act
- Artificial Intelligence & Algorithmic Fairness Initiative (EEOC)
 - May 2022 ADA “Technical Assistance”
 - January 2023 Public Meeting

State and Local

- New York City – enacted; enforcement begins July 5, 2023
- Washington D.C.
- California
- Illinois
- AI-related bills introduced in at least 17 states in 2022

Global

- European Union
- APAC

AI: From Adoption to Inherence

- Educate and upskill personnel across the hierarchy to “think AI”
- Prepare for global compliance and data-minimization expectations
- Maintain human involvement
- Map out current AI uses and assess impactful needs
- Assemble broad team of stakeholders (HR, IT, Legal, Privacy, Ops)
- Conduct privileged assessment of AI tools (risk AND compliance)
- Rinse & repeat: create ongoing testing/validation framework with monitoring and flexibility

Monitor the Legal Landscape



- Sign up for Littler webinars and news alerts
 - ✓ Robotics, Artificial Intelligence (AI) and Automation
 - ✓ AI in Human Resource Decisions
 - ✓ Workplace Policy Institute

European Perspective – Current AI Position

AI Act

Local Data Protection Laws

- e.g. Data Protection Act in the UK
- Transparency
- The right not to be subjected to solely automated decision-making except in limited situations (GDPR)

AI Act – European Perspective

“Throughout the recruitment process and in the evaluation, promotion, or retention of persons in work-related contractual relationships, such systems may perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual orientation”

Note! Cases alleging facial recognition systems to verify identity indirectly discriminate on the ground of race

AI Act

Scope

- AI systems which affect EU Individuals
- Regardless of your location

Penalties

- Penalties **up to** the greater of EUR 30 million (USD 33 million) or 6% of global annual revenue, whichever is higher

Risk-Based Approach

- Unacceptable
- High risk: **includes AI systems used in employment**
- Limited risk
- Minimal risk

AI Act – Tips



Audit what AI you use



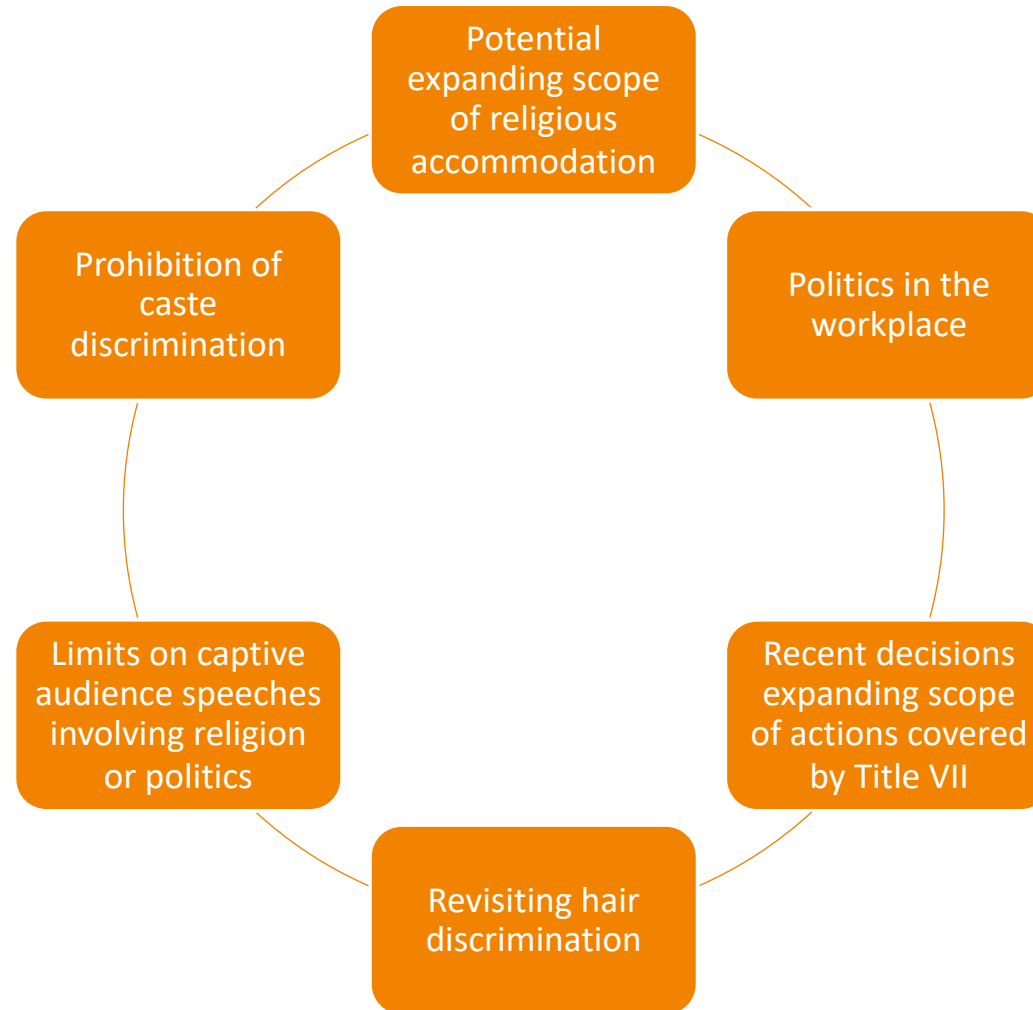
Governance:
policies, guidelines,
resources and skills



Work with providers
to ensure compliance



Other Evolving Issues Impacting Diversity Efforts



Key Takeaways

1

Inclusion, equity and diversity programs are great!

2

But there is a “line” between requirements and aspirational goals

3

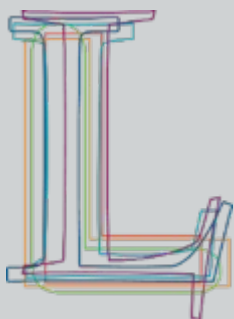
And it is not always a bright line

4

Be mindful of the tension between IE&D goals and employment discrimination laws

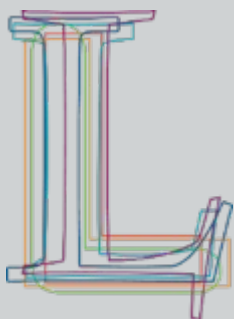
5

Use the attorney-client privilege where appropriate



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You!

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